

**STATE OF VERMONT  
PUBLIC SERVICE BOARD**

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<b>JOINT PETITION OF VERIZON NEW</b>	)	
<b>ENGLAND INC., D/B/A VERIZON VERMONT,</b>	)	
<b>FAIRPOINT COMMUNICATIONS, INC.</b>	)	
<b>FOR APPROVAL OF ASSET TRANSFER,</b>	)	<b>DOCKET 7270</b>
<b>ACQUISITION, OF CONTROL BY MERGER</b>	)	
<b>AND ASSOCIATED TRANSACTIONS</b>	)	
	)	

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**POST-HEARING BRIEF OF SOVERNET AND SEGTEL**

Sovernet and segTEL file this post-hearing brief to address a number of legal, policy, financial and operational issues raised as a result of FairPoint’s proposal to purchase Verizon’s local exchange assets in Vermont, New Hampshire and Maine for \$2.7 billion. The sale of Bell Operating Company (BOC) local exchange assets across three states to a relatively small rural carrier with no BOC background is monumental and it raises many important issues.

In this brief, Sovernet and segTEL will focus primarily on the risk of competitive harms posed by the transaction. For the reasons discussed more fully below, Sovernet and segTEL cannot support the merger as proposed because it will result in obstructing or preventing competition in the wireline telecommunications market. First, FairPoint has retreated significantly from its commitment to be subject to the same regulatory obligations as Verizon. Specifically, FairPoint has backtracked on its commitment to not seek the suspension or modification of its section 251 unbundling obligations; seeks to be subject to less regulation than Verizon after the closing; seeks the right to discriminate against its competitors by avoiding certain section 272 requirements that apply to Verizon as well as Performance Assurance Plan requirements associated with the cutover; and seeks to avoid the same level of scrutiny of its wholesale support systems that Verizon’s

systems were subject to; and, asserting its claim that it is not a BOC, has offered a voluntary checklist proposal that is unenforceable.

FairPoint has also failed to demonstrate that it has the financial resources, expertise and incentive to provide unbundled network elements and interconnection to CLECs in a manner that is equal to or better than the prices, terms, conditions, and quality provided by Verizon. Additionally, FairPoint has failed to adequately describe its plans for its wholesale organization and operation support systems. Finally, FairPoint has failed to agree to conditions to safeguard against harms to competition that other carriers have voluntarily agreed to in merger proceedings. Accordingly, the Board should either deny the application or impose conditions to protect competition in the wireline telecommunications market in Vermont.

## **FACTS**

### **I. The Joint Petition**

1. On or about January 31, 2007, FairPoint and Verizon (together the “Joint Petitioners”) filed a Joint Petition for Approval of Asset Transfer, Acquisition of Control by Merger and Associated Transactions, Pursuant to 30 VSA Sections 107, 109, 231 and 311 (the “Joint Petition”).
2. The Joint Petition seeks Board approval of a series of transactions and transfers that, if approved, would result in FairPoint acquiring the current Verizon franchise to provide wireline telecommunications services in Vermont, and owning the network that Verizon currently uses to provide those services.<sup>1</sup>

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<sup>1</sup> Joint Petition at 4-7.

3. The Joint Petitioners request that the Board determine that the proposed transactions and transfers are for the “public good” under a number of state statutes including, but not limited to, 30 VSA section 107 and that the proposed merger or consolidation “will not result in obstructing or preventing competition” under 30 VSA section 311.<sup>2</sup>
4. The Joint Petitioners assert that “the transaction will have no adverse effect on the services provided to customers in Vermont,”<sup>3</sup> that “FairPoint proposes to assume all of the rights and obligations of Verizon in Vermont,”<sup>4</sup> that the transaction “will be transparent to customers of Verizon in Vermont,”<sup>5</sup> that FairPoint will “assume Verizon’s wholesale obligations,”<sup>6</sup> and will “provide benefits to customers in Vermont without any countervailing harms.”<sup>7</sup>

## **II. Regulatory Status and Background**

5. Verizon is an ILEC and a Regional Bell Operating Company (“BOC”).<sup>8</sup>
6. As an ILEC, Verizon must comply with the market opening provisions of section 251(c), which require it to interconnect with requesting carriers and to offer unbundled network elements at cost-based TELRIC rates on a non-discriminatory basis.<sup>9</sup> Other duties that are imposed on ILECs under section 251(c) include the duty to negotiate in good faith in accordance with section 252; the duty to offer at resale at wholesale rates any telecommunications services that the carrier provides at retail, the duty to provide notice of changes in the information necessary for the transmission and routing of services

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<sup>2</sup> *Id.* at 1, 7.

<sup>3</sup> *Id.* at 1.

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.* at 6.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 8.

<sup>8</sup> Tr. 9/7/07 at 11.

<sup>9</sup> 47 U.S.C. section 251(c).

using that LEC's networks; and the duty to provide collocation at just and reasonable and non-discriminatory rates.<sup>10</sup>

7. As a BOC that has chosen to enter the long distance market, Verizon has additional obligations to comply with section 271 requirements to offer checklist items at “just and reasonable” and “nondiscriminatory” rates. The checklist includes the following items:

- i); interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1);
- ii) nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1);
- iii) nondiscriminatory access to poles, conduit and rights of way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224;
- iv) local loops transmission from the central office to the customer's premises, unbundled from local switching or other services;
- v) local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services;
- vi) local switching unbundled from transport, local loop transmission, or other services;
- vii) nondiscriminatory access to ... 911 and E911 services, directory assistance services and operator call completions services;
- viii) white pages directory listings for customers of other carrier's telephone exchange access service;
- ix) until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange access customers. After that date, compliance with such guidelines, plan or rules.
- x) nondiscriminatory access to databases and associated signaling necessary for call routing and completion;
- xi) number portability;
- xii) nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3);
- xiii) reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2);
- xiv) telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3).<sup>11</sup>

8. In addition to the above described checklist items, as an RBOC that has chosen to enter the long distance market in Vermont, Verizon is subject to a Performance Assurance

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<sup>10</sup> *Id.*

<sup>11</sup> 47 U.S.C. section 271(c)(2)(B)

Plan (“PAP”) under section 271 which contains metrics that apply to its provision of wholesale services to CLECs and financial penalties for the failure to meet certain metrics. The purpose of the PAP is to ensure against backsliding in the provision of wholesale services to CLECs.<sup>12</sup>

9. Additionally, BOCs must comply with section 272 requirements regarding certain separate affiliate safeguards, structural and transactional requirements, and non-discrimination requirements (some of which have sunset).<sup>13</sup>
10. FairPoint is not a BOC and therefore is not subject to section 271 concerning checklist items or the PAP. Nor is it required to comply with section 272.<sup>14</sup>
11. FairPoint is a rural LEC in Vermont. Generally speaking, it is not required to comply with the market opening unbundling and interconnection obligations of section 251(c). As an operational matter, FairPoint has no experience providing wholesale services to CLECs.<sup>15</sup>
12. If the transaction is approved, FairPoint will be treated as an ILEC, subject to section 251 obligations.<sup>16</sup> However, FairPoint’s position is that it should not be considered a BOC or a successor or assign of a BOC following the closing of the transaction and therefore will not be subject to section 271 and 272 obligations.<sup>17</sup>

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<sup>12</sup> *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc. and Verizon Select Services Inc., for Authorization to Provide in-Region, InterLATA Services in Vermont*, CC Docket 02-07, Memorandum Opinion & Order, at para. 82 (2002) (*Vermont 271 Order*).

<sup>13</sup> 47 U.S.C. Section 272.

<sup>14</sup> Tr. 9/07/07 at 172-173

<sup>15</sup> SOV/SEG Exh. 12 at page 25.

<sup>16</sup> SOV/SEG Exh. 15 (“FairPoint believes that the obligations that apply under section 251 of the Act and the FCC’s rules thereunder (for example, interconnection, unbundling, resale collocation, etc) will apply to FairPoint in the to-be-acquired service territories post-closing (to the extent those obligations remain in effect under the law and the FCC’s rulings.”); Prefiled rebuttal testimony of Michael Skrivan at page 24, lines 12-14 (“FairPoint has stated that, following the transaction, it will be an incumbent local exchange carrier (“ILEC”) that is subject to section 251 as well as section 252. There does not seem to be any basis for serious argument on this point.”)

<sup>17</sup> Tr. 9/7/07 at 172, 173.

13. Additionally, if the transaction is approved, FairPoint would have less than 2% of the subscriber lines nation-wide and would be eligible to seek the suspension or modification of section 251(b) and (c) obligations under section 251(f)(2).<sup>18</sup>
14. Verizon does not meet the definition of a rural LEC and therefore is not eligible to seek the exemption, suspension or modification of its unbundling obligations under section 251(f)(1) or (2).<sup>19</sup>

### **III. Verizon's Wholesale Department and Back Office Systems Are Not Included In The Transaction**

15. A key aspect of the transaction is that it does not include Verizon's wholesale organization. This will require FairPoint, a carrier with no wholesale experience, to create its own wholesale department to provide the services to CLECs that Verizon currently provides.<sup>20</sup>
16. Today, when a CLEC orders interconnection from Verizon under section 251, the request is handled by the Interconnection Services Team.<sup>21</sup> The Interconnection Services Team is staying with Verizon.<sup>22</sup>
17. Today, when a CLEC requests access to poles and conduit, that request goes to Verizon's License Administration Group.<sup>23</sup> The License Administration Group is staying with Verizon.<sup>24</sup>

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<sup>18</sup> Prefiled Rebuttal Testimony of Michael Skrivan at page 26, lines 8-11.

<sup>19</sup> Tr. 9/7/07 at 12.

<sup>20</sup> Prefiled Direct Testimony of Gary J. Ball at page 8, lines 8-11.

<sup>21</sup> Tr. 9/7/07 at 39.

<sup>22</sup> *Id.*

<sup>23</sup> Tr. 9/7/07 at 36.

<sup>24</sup> *Id.*

18. Today, when a CLEC requests collocation from Verizon, it is handled by Verizon's Collocation Care Center.<sup>25</sup> The Collocation Care Center is not being transferred to FairPoint.<sup>26</sup>
19. Today, when a CLEC preorders and orders unbundled network elements and interconnection from Verizon, those orders go through the National Market Center and the Access Service Operations Center.<sup>27</sup> Those departments are not being transferred to FairPoint.<sup>28</sup>
20. Today, the provisioning of local services on behalf of CLECs is being performed by Verizon's Regional CLEC Coordination Center, which is not being transferred to FairPoint.<sup>29</sup>
21. Today, when a CLEC seeks the repair of an unbundled network element or wholesale service it is handled by Verizon's Regional CLEC Maintenance Center, which is not being transferred to FairPoint.<sup>30</sup>
22. Today, CLEC bills are handled by Verizon Service Operations, Wholesale Claims and Collections, which is not being transferred to FairPoint.<sup>31</sup>
23. In addition to keeping its wholesale department, Verizon will retain all of the back office systems that CLECs use today in connection with preordering, ordering, provisioning, maintenance and repair, and billing for unbundled network elements and interconnection services.<sup>32</sup>

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<sup>25</sup> Tr. 9/7/07 at 37.

<sup>26</sup> *Id.*

<sup>27</sup> SOV/SEG Exh. 1

<sup>28</sup> Tr. 9/7/07 at 37.

<sup>29</sup> Tr. 9/7/07 at 37.

<sup>30</sup> Tr. 9/7/07 at 39.

<sup>31</sup> Tr. 9/7/07 at 40

<sup>32</sup> Tr. 9/7/07 at 40.

24. Accordingly, FairPoint will have to create, staff and train its own wholesale department and build its own operations support systems to serve wholesale customers. It is anticipated that FairPoint's back office systems will not be ready at closing.<sup>33</sup>

25. Before Verizon was required to enter the long distance market in Vermont, it was required to demonstrate that its operating support systems were adequate to provide CLECs with access to unbundled network elements and interconnection in commercial volumes and at parity with the services that Verizon provides to itself.<sup>34</sup>

#### **IV. The Transition Service Agreement and Cutover**

26. FairPoint and Verizon have entered into a Transition Services Agreement ("TSA").

Under the TSA, Verizon will perform certain operating support functions, including all of the support and systems that CLECs currently use for the preordering, ordering, provisioning, maintenance and repair and billing for wholesale services, until FairPoint notifies Verizon that it is ready to cutover to its systems.<sup>35</sup>

27. FairPoint will be charged monthly fees for the transition services provided by Verizon.

FairPoint must pay Verizon \$14.2 million per month for the first 8 months of the TSA.<sup>36</sup>

The rates then decrease by \$500,000 for the next 4 months, but on the 13<sup>th</sup> month the rates go back up to \$14.2 million, and increase by \$500,000 each month thereafter.<sup>37</sup>

28. Under the TSA, FairPoint has sole authority to determine when it will cutover from Verizon's systems to its systems.<sup>38</sup> Verizon has no contractual responsibility to ensure that FairPoint's systems are at least as good as Verizon's prior to closing.<sup>39</sup>

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<sup>33</sup> Tr. 9/7/07 at 40, 41.

<sup>34</sup> *Vermont 271 Order* at paras. 39-44.

<sup>35</sup> Tr. 9/7/07 at 41.

<sup>36</sup> Prefiled direct testimony of Gary Ball at page 9, lines 14-16.

<sup>37</sup> *Id.* at page 9, lines 16-18.

<sup>38</sup> Tr. 9/7/07 at 42.

<sup>39</sup> *Id.* at 41.



29. FairPoint hopes to obtain all state regulatory approvals by December 30, 2007 so that it can close on or before January 31, 2008.<sup>40</sup> The Company intends to cutover from Verizon's systems to its systems within 4 months of closing, or on or about May 30, 2008.<sup>41</sup>
30. FairPoint proposes to give CLECs six (6) months advance notice of the cutover from Verizon's systems to FairPoint's systems. Currently, FairPoint intends to give such notice in the November 2007 time frame,<sup>42</sup> well in advance of the anticipated closing date of January 30, 2008,<sup>43</sup> when it would actually become the ILEC in Vermont.
31. CLECs will have to perform certain activities prior to the cutover to FairPoint's systems, including retraining their employees to use FairPoint's new systems, creating a new interface to interact with FairPoint's new systems, creating new processes, and installing new point codes.<sup>44</sup>
32. FairPoint has no plans to compensate CLECs for this work or for any damages they incur if there are problems with the cutover.<sup>45</sup>

## **ARGUMENT**

### **I. FAIRPOINT HAS RENEGED ON ITS COMMITMENT TO BE SUBJECT TO THE SAME REGULATORY OBLIGATIONS AS VERIZON, TO THE DETRIMENT OF COMPETITION IN VERMONT.**

Under 30 VSA section 311, a consolidation or merger shall not become effective without a Board finding that "such consolidation or merger will not result in obstructing or preventing competition in the purchase or sale of any product, service, or commodity, in the sale, purchase or manufacture of which such corporations are engaged."

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<sup>40</sup>*Id.* at 282.

<sup>41</sup>*Id.*

<sup>42</sup>*Id.*

<sup>43</sup>*Id.*

<sup>44</sup>*Id.* at 284.

<sup>45</sup> Prefiled Rebuttal Testimony of Brian Lippold at page 20, lines 19-21, page 21, lines 1-3.

As an ILEC, Verizon currently provides CLECs with access to unbundled network elements, collocation and interconnection services under sections 251(c) and 252(d)(2). CLECs such as Sovernet and segTEL rely on Verizon as their supplier of these unbundled network elements and interconnection services, which they in turn use as inputs to provide their own retail services in competition with Verizon.<sup>46</sup> As a BOC that has been permitted to enter the long distance market, Verizon's service quality in providing these unbundled network elements and interconnection services to its competitors is measured according to the metrics set forth in a PAP to guard against backsliding. The PAP contains penalties that apply in the event that Verizon fails to meet certain metrics.<sup>47</sup> As a BOC, Verizon is also required to provide CLECs with certain checklist items under section 271.<sup>48</sup> CLECs such as Sovernet and segTEL are dependent on Verizon's operating support systems to obtain access to these network elements and interconnection services.<sup>49</sup> Prior to being permitted to enter the long distance market Verizon was required to demonstrate that such operating support systems are nondiscriminatory.

In the Joint Petition filed in January of this year, the Petitioners stated that "the transaction will have no adverse effect on the services provided to customers in Vermont,"<sup>50</sup> that "FairPoint proposes to assume all of the rights and obligations of Verizon in Vermont,"<sup>51</sup> that the transaction "will be transparent to customers of Verizon in Vermont,"<sup>52</sup> that FairPoint will "assume Verizon's wholesale service obligations"<sup>53</sup> and that the transaction will "provide benefits to customers in Vermont without any countervailing harms."<sup>54</sup>

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<sup>46</sup> Prefiled testimony of Gary Ball at page 3, lines 1-6.

<sup>47</sup> Tr. 9/7/07 at 182.

<sup>48</sup> Prefiled Direct of Gary J. Ball at page 14, lines 16-22.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1.

<sup>51</sup> *Id.* at 2.

<sup>52</sup> *Id.* at 6.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 8.

Later, FairPoint backpedaled somewhat, stating that “the obligations that apply under section 251 of the Act and the FCC’s rules thereunder (for example interconnection, unbundling, resale, collocation, etc) will apply to FairPoint ... post closing” but that FairPoint does not concede that it will become a “BOC” as a result of the transaction and, thus, become generally subject to section 271 of the Act.”<sup>55</sup>

In prefiled rebuttal testimony, FairPoint responded to Sovernet and segTEL witness Gary Ball’s recommendation that the Board require FairPoint to comply with section 251 by stating that “no condition is necessary” as follows:

“FairPoint agrees that it must comply with section 251. However, no condition is necessary. FairPoint has stated that, following the transaction, it will be an incumbent local exchange carrier (“ILEC”) that is subject to 251 as well as section 252. There does not appear to be any serious basis for serious argument on this point.”

Although this statement seems emphatic, other statements reveal that, after closing, FairPoint generally seeks to be subject to less regulation than Verizon in connection with section 251 specifically and wholesale service obligations generally. As will be described in more detail below, leaving the extent of its wholesale obligations to FairPoint would “obstruct or prevent competition” for wireline telecommunications services in Vermont.

**A. FairPoint Has Backtracked on its Commitment That It Will Not Seek the Suspension or Modification of its Section 251(b) or (c) Obligations under Section 251(f)(2) of the Communications Act.”**

Section 251 of the Act is the cornerstone of competition.<sup>56</sup> Section 251(c) requires ILECs such as Verizon to open their networks to competition and provide competitors the ability to purchase unbundled network elements such as local loops (including 2 wire analogue loops, xDSL loops, DS-1 loops and DS-3 loops) and DS-1, DS-3 and dark fiber interoffice transport at cost-based

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<sup>55</sup> SOV/SEG Exh. 15.

<sup>56</sup> Prefiled Direct Testimony of Gary J. Ball at page 14, lines 16-19.

TELRIC rates on a non-discriminatory basis in accordance with FCC rules.<sup>57</sup> Importantly, the FCC has held that a requesting carrier is impaired “when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including economic barriers, that are likely to make entry into a market uneconomic.”<sup>58</sup> The FCC’s impairment analysis in the *Triennial Review Order* accounts for intermodal alternatives, self-provisioning of network elements, and the potential ability of a requesting carrier to obtain similar facilities from a third party.<sup>59 60</sup> Accordingly, if the market-opening provisions of section 251(c) were no longer available at cost-based TELRIC rates in Vermont, CLECs would be impaired, economic barriers would make entry in the market uneconomic, and competition for telecommunications services would suffer. The Board must not let this happen.

Section 251(f) of the Act deals with exemptions, suspensions and modifications of section 251(b) and (c) obligations for rural carriers. Section 251(f)(1) applies to “exemptions” for “rural telephone companies” and reads in pertinent part as follows:

(1) EXEMPTION FOR CERTAIN RURAL TELEPHONE COMPANIES-

(A) EXEMPTION-Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines ... that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 ...”

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<sup>57</sup> 47 C.F.R. 51.319(a); 47 C.F.R. 51.319(e).

<sup>58</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd at 16978, 17035, para. 84 (2003) (*Triennial Review Order*), corrected by Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), vacated and remanded in part, affirmed in part, *United States Telecom Ass’n v. FCC*, 359 F. 3d 554 (D.C. Cir. 2004) (USTA II) cert. denied, 125 S.Ct. 313.

<sup>59</sup> *Id.* at 17035, 17044-45, paras. 84, 87, 97-98.

<sup>60</sup> In the *Triennial Review Remand Order*, the FCC retained the unbundling framework adopted in the *Triennial Review Order*, but clarified the impairment standard to make clear that when evaluating whether the lack of access to an incumbent LEC network element “poses a barrier or barrier to entry...that are likely to make entry into a market uneconomic,” we make that determination with regard to a reasonably efficient competitor. *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 04-313, 01-338, Order on Remand 20 FCC Rcd 2533, para. 22 (2005).

Section 251(f)(2) applies to “suspensions and modifications” for “rural carriers” and reads in pertinent part:

(2) SUSPENSIONS AND MODIFICATIONS FOR RURAL CARRIERS- A local exchange carrier with fewer than 2 percent of the Nation’s subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange facilities specified in such petition.”

Verizon is not a “rural telephone company” or a “rural carrier” and is not entitled to seek an exemption, suspension or modification of its wholesale obligations under section 251(f)(1) or (2).

However, if the transaction is approved, FairPoint would be eligible to seek a “suspension or modification” under section 251(f)(2), calling into serious question whether the transaction, if approved, would result in the diminution or demise of the market-opening services that Verizon is compelled to offer today at cost-based TELRIC rates under section 251(c) and 252(d)(2). Given that the FCC has already found that CLECs would be impaired in the absence of these facilities, and that economic barriers would make entry uneconomic, the suspension or modification of the obligation to provide network elements, collocation and interconnection services at TELRIC rates would surely “obstruct or prevent competition” for wireline telecommunications services within the meaning of 30 VSA section 311.

In his prefiled direct testimony, dated, March 27, 2007, FairPoint’s President Nixon promised that FairPoint:

“will not take the position that this company is a rural telephone company entitled to exemption from Section 251(c) obligations under section 251(f)(1) of the Communications Act, or to suspension or modification of Section 251(b) or to (c) obligations under Section 251(f)(2) of the Communications Act.”<sup>61</sup>

One might have thought that President Nixon’s unqualified promise not to seek the “exemption from Section 251(c) obligations”, or the “suspension or modification of Section 251(b) or (c)

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<sup>61</sup> Prefiled Direct Testimony of Peter Nixon at page 28, lines 7-11.

obligations” might have been the end of it. After all, Verizon does not have the right to seek such exemptions, suspensions or modifications and FairPoint previously had agreed to be subject to the same regulatory obligations as Verizon, including section 251. However, in prefiled rebuttal testimony filed three months later, FairPoint witness Skrivan cites the very two sentences contained in President Nixon’s testimony above and explains, incredibly, that what this language means is that “FairPoint will not claim 251(f) rural exemptions at *closing or in the future*,” but that FairPoint “reserves the right to approach the Board in the future seeking the 2% suspensions and modifications” of the wholesale obligations of section 251 of the Act.<sup>62</sup> Following this not so subtle sleight of hand, Mr. Skrivan pontificates that relief from TELRIC pricing for unbundled network elements is one kind of relief that could be obtained under Section 251(f)(2).<sup>63</sup>

FairPoint’s reversal of its commitment that it will not seek the exemption, suspension, or modification of section 251 obligations, and its suggestion that the company would have the right to seek relief from TELRIC pricing, if allowed, would imperil competition for telecommunications services in Vermont. CLECs are currently dependent on Verizon for access to unbundled network elements and interconnection services at TELRIC rates under section 251 and would be impaired if such access were taken away. As Sovernet and segTEL witness Ball states:

“FairPoint is intending to keep a major deregulatory card in its back pocket for use at any time after the merger. If FairPoint can suspend, modify or even eliminate most of its key 251 obligations, competition will obviously be much worse off. Even if FairPoint petitions for relief and fails, competitors will still be forced to deal with the uncertainty and litigation costs of the resulting proceedings.”<sup>64</sup>

The Board must not permit FairPoint to keep this deregulatory card in its back pocket for use at any time after the merger. It is clear that, but for the proposed transaction, CLECs do not face the risk that its supplier of unbundled network elements and interconnection services will assert that it is

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<sup>62</sup> Prefiled Rebuttal Testimony of Michael Skrivan at page 26 (emphasis added).

<sup>63</sup> *Id.* at page 27, lines 8-21.

<sup>64</sup> Prefiled Rebuttal Testimony of Gary J. Ball at page 5, lines 9-14.

entitled to seek the exemption, suspension or modification of its section 251 wholesale obligations under section 251(f)(1) or (2). Approving a transaction that does not eliminate such a risk would not satisfy the requirements in 30 VSA section 311 that a consolidation or merger “will not result in obstructing or preventing competition” in the market for wireline telecommunications services.

**B. FairPoint’s Voluntary Proposal to Offer Checklist Items As If it Were a BOC is Meaningless If Neither the FCC nor the Board Has the Jurisdiction to Enforce It.**

Verizon is a BOC and is compelled to offer checklist items under section 271 at “just and reasonable” and “non-discriminatory” rates. As the FCC has stated, the checklist requirements “establish an independent obligation for BOCs to provide access to loops, switching, transport and signaling regardless of any unbundling analysis under section 251.”<sup>65</sup> State commissions in New Hampshire and Maine have attempted to enforce Verizon’s obligations as a BOC to provide checklist items by requiring it to include them in a wholesale tariff.<sup>66</sup> Verizon has resisted these enforcement efforts by appealing these state PUC orders on the ground that states do not have enforcement authority over section 271. The First Circuit Court of Appeals recently released its decision in which it agrees with Verizon that authority under section 271 is granted exclusively to the FCC.<sup>67</sup> That litigation is sure to continue. What is clear, however, is that CLECs currently have the right to file an enforcement action against a BOC under section 271(d)(6) if it believes that a BOC is not providing a checklist item at just and reasonable rates. Section 271(d)(6) states in pertinent part:

**“(6) ENFORCEMENT OF CONDITIONS-**

**(A) COMMISSION AUTHORITY-** If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company

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<sup>65</sup> *TRO Remand Order*, para. 653.

<sup>66</sup> See, *Proposed Revisions to Tariff NHPUC 84-(Statement of Generally Available Terms and Conditions)-Petition for Declaratory Order re Line Sharing*, DT 03-201 and DT 04-176, Order Following Briefing No. 24,442 (March 11, 2005); March 1, 2002 Letter to Edward Dinan from Dennis Keschl; *Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Order-Part II, Docket No. 2002-682 (September 3, 2004) and Order (September 13, 2005) and Order-Part 2 (November 17, 2005)..

<sup>67</sup> *Verizon v. Maine Public Utilities Commission*, \_\_\_Slip\_\_\_ (First Cir. 2007).

has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing—

- (i) Issue an order to such company to correct the deficiency;
- (ii) Impose a penalty on such company pursuant to title V; or
- (iii) Suspend or revoke such approval.

Importantly, the enforcement rights of section 271(d)(6) apply only to “*Bell operating compan[ies]*,” a status that FairPoint asserts it does not meet.

It almost goes without saying that if FairPoint were considered a BOC, it would be subject to section 271 and if there was a dispute about whether an item such as dark fiber loop constitutes a checklist item or whether it is priced at a “just and reasonable” and “non-discriminatory” rate, a requesting carrier could file an enforcement action at the FCC under section 271(d)(6). But FairPoint asserts that it is not and will not be a BOC or a “successor or assign” to a BOC and that it cannot be compelled to offer section 271 checklist items.<sup>68</sup> Perhaps recognizing that FairPoint’s failure to offer the checklist items that Verizon is or will be required to offer in the future would by its very terms impair competition under 30 VSA 311, FairPoint witness Skrivan’s prefiled rebuttal testimony provides as follows:

“Notwithstanding FairPoint’s belief that it should not be considered a BOC, and as a benefit to the state and its customers (including CLECs) FairPoint confirms that it agrees to provide anything required under the section 271(c)(2)(B) checklist, as discussed in the rebuttal testimony of Mr. Lippold and Nixon. Thus, to the extent those requirements evolve over time, FairPoint’s obligations to CLECs will evolve with them. *FairPoint understands that the Board may rely on its statements and agreements.*”<sup>69</sup>

Under cross examination, Mr. Skrivan testified that FairPoint would “seriously consider” making this voluntary checklist proposal a binding commitment of the merger.<sup>70</sup> He also stated that FairPoint would voluntarily agree that, if a dispute were to arise, the Board would have the

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<sup>68</sup> SOV/SEG Exh. 15; Tr. 9/7/07 at 176.

<sup>69</sup> Prefiled Rebuttal Testimony of Michael Skrivan at page 29, lines 6-12 (emphasis added).

<sup>70</sup> Tr. 9/7/07 at 175.



authority to enforce FairPoint's agreement to offer checklist items in Vermont.<sup>71</sup> However, any meaningful reading of Mr. Skrivan's words that "*FairPoint understands that the Board may rely on its statements and agreements,*" was substantially undercut moments later when he explained that if a dispute were to arise concerning whether a checklist item was being offered at a "just and reasonable" rate, "we would take the pricing matter *to the FCC* for resolution."<sup>72</sup> Pressed as to why the Board could not resolve such pricing disputes by applying the federal standard of "just and reasonable," Mr. Skrivan conceded that FairPoint's position is that it would not be a BOC, would not be a successor or assign of a BOC, would not be subject to 271, and could not be compelled to offer checklist items, but at the same time continued to assert that under its voluntary checklist proposal the FCC and not the Board would have the authority to apply the "just and reasonable" standard and resolve pricing disputes.<sup>73</sup>

Any vestige of Board enforcement authority over FairPoint's voluntary checklist proposal was nullified when Mr. Skrivan clarified that not only would the FCC, in his view, have authority over the pricing of FairPoint's checklist items, but that the FCC would be the entity to resolve any disputes about what network elements constitute checklist items.<sup>74</sup> If FairPoint is correct that it is not a BOC, the FCC will have no jurisdiction. In that event, FairPoint's refusal to submit to the Board's jurisdiction in connection with its voluntary agreement to provide checklist items would result in CLECs having no enforcement rights if disputes were to arise concerning pricing or what network elements constitute checklist items. FairPoint's refusal is also at odds with this Board's previous retention of its independent state law authority to insure that checklist items be provided in

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<sup>71</sup> *Id.*

<sup>72</sup> Tr. 9/07/07 at 175 .

<sup>73</sup> Tr. 9/07/07 at 175, 176.

<sup>74</sup> Tr. 9/07/07 at 184, 185.

Vermont.<sup>75</sup> FairPoint's proposal for checklist items puts CLECs in a worse position than they are in with Verizon because CLECs would have no enforcement rights.<sup>76</sup>

**C. FairPoint Seeks to be Subject to less Regulation Than Verizon And the Right to Discriminate Against Competitors.**

Although FairPoint had previously committed to assume the same wholesale obligations as Verizon, FairPoint witness Skrivan suggests that "FairPoint should be subject to a lesser degree of regulation than Verizon."<sup>77</sup> At the hearing, Mr. Skrivan asserted that FairPoint would not agree to comply with the same section 272 requirements that currently apply to Verizon because "we don't see any public interest need to do that."<sup>78</sup> DPS witness Lafferty points out in his prefiled surrebuttal testimony that the 272(e) non-discrimination requirements applicable to BOCs continue for Verizon in the state and should apply to FairPoint.<sup>79</sup> As Mr. Lafferty states:

"FairPoint has stated that it will accept Verizon's regulatory obligations in Vermont, and it should be required to comply with the affiliate transactions requirements in the same manner as Verizon."<sup>80</sup>

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<sup>75</sup> See, *Joint Petition of New England Telephone & Telegraph Company d/b/a NYNEX, NYNEX Corporation, and Bell Atlantic Corporation for approval of a merger of a wholly-owned subsidiary of Bell Atlantic Corporation into NYNEX Corporation (n re: Compliance Phase)*, Docket 5900, Order at 7 (6/29/99) ("The Board concluded that the merger could have the effect of obstructing or preventing competition in Vermont. Desiring that Bell Atlantic take "reasonable steps to open its network to competition," the Board required that Bell Atlantic comply with the Competitive Checklist by September 30, 1997. In essence the Board used the checklist as a way to measure Bell Atlantic's steps to open its network to competition. Compliance with the checklist constituted an important element in the Board's determination that the Bell Atlantic-NYNEX merger would promote the public good and would not have anti-competitive effects."); *Petition of Verizon New England, Inc. d/b/a Verizon Vermont, for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Vermont, Pursuant to Section 252 of the Communications Act, as amended, and the Triennial Review Order*, Docket 6932 Order at 247-250 (2/27/2006) (where the Board declined to exercise its authority to require Verizon to offer delisted UNES as checklist items in part on the rationale that "enforcement of Section 271 obligations rests largely with the FCC.") This rationale would not apply in the event that the transaction is approved and FairPoint is not considered a BOC or a successor or assign of a BOC.

<sup>76</sup> Prefiled Surrebuttal of Gary J. Ball at page 6, lines 18-23.

<sup>77</sup> Prefiled Rebuttal Testimony of Michael Skrivan at pages 11-12.

<sup>78</sup> Tr. 9/07/07 at 173, 174.

<sup>79</sup> Prefiled Surrebuttal Testimony of Wayne F. Lafferty at 17, lines 13-15.

<sup>80</sup> *Id.* at page 18, lines 12-14.

Sovernet and segTEL agree. Section 272(e) is one example of the safeguards against discrimination contained in section 272. It provides that a Bell Operating Company and an affiliate that is subject to the requirements of section 251(c)--:

“(1) shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or its affiliates.”

There is no public interest reason why FairPoint should be permitted to discriminate against unaffiliated carriers in connection with requests for telephone exchange and exchange access services. The ability to discriminate against unaffiliated carriers would tend to obstruct or prevent competition in the sale of telecommunications services in violation of 30 VSA section 311. Moreover, but for the proposed transaction, CLECs in Vermont would not have to worry that their supplier of wholesale services will attempt to use its regulatory status to be relieved of safeguards against discriminatory practices in section 272.

**D. FairPoint Witness Skrivan Asserts that FairPoint Will Abide By The Same PAP that Applies to Verizon While FairPoint Witness Haga Seeks a 120 Day Grace Period from the PAP During the Time that is Most Critical to CLECs.**

When the FCC approved Verizon’s application to enter the long distance market in Vermont, it found “that the PAP currently in place in Vermont will provide assurance that the local market will remain open after Verizon receives section 271 authorization.”<sup>81</sup> The purpose of the PAP is to “protect against backsliding after BOC entry into the long distance market.”<sup>82</sup> FairPoint witness Skrivan initially testified that FairPoint would “abide by the Performance Assurance Plan (“PAP”) ... applicable to Verizon in Vermont.”<sup>83</sup> On cross examination, however, he read a

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<sup>81</sup> *Vermont 271 Order* at para. 74.

<sup>82</sup> *Id.* at fn 256.

<sup>83</sup> Prefiled rebuttal testimony of Michael Skrivan at page 4, lines 16,17. Tr. 9/7/07 at 179.

contradictory FairPoint response to a data request that says “FairPoint anticipates it will need a grace period of approximately 30 days prior to cutover and 90 days following cutover when the metrics set forth in the PAP ... should not apply.”<sup>84</sup> Mr. Skrivan conceded that from a CLEC’s perspective the period immediately following the cutover was the most critical time for the application of the PAP, but then denied that the PAP “creates any additional incentive for FairPoint to make sure its systems are ready.”<sup>85</sup> Of course, if the latter statement is true, it provides additional support for Mr. Ball’s recommendation (discussed later) that a fund be created to reimburse CLECs for costs and harms they incur in connection with the cutover and undercuts FairPoint witness Lippold’s assertions that CLECs have adequate remedies in the event of a poor cutover.<sup>86</sup> FairPoint should not be provided a “grace period” for any period prior to or after the cutover. It simply does not need a free pass for discriminating against its competitors.

In any event, Mr. Skrivan’s contradictory assertions regarding whether FairPoint would abide by the PAP and whether the PAP would provide any protection to CLECs in connection with a poor cutover prompted the following exchange between Board staff attorney Young and the witness:

MR. YOUNG: Mr. Sawyer, can I cut in here for a second? ... Your testimony says the company simply is going to abide by the PAP. This discovery response says something different. Which of the two is the company’s position?

MR. SKRIVAN: The company’s position is that we intend to implement the PAP and abide by it, but that for this transition period we would like some grace in terms of understanding that during that transition period it’s –there’s going to be a lot going on and we’re going to do our best to get everything right.

MR. YOUNG: So the short answer is this discovery response is what the company’s position is?

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<sup>84</sup> TR. 9/7/07 at 180; See, SOV/SEG Exh.11.

<sup>85</sup> Tr. 9/7/07 at 181.

<sup>86</sup> Prefiled Rebuttal Testimony of Brian Lippold at page 21, lines 2-3.

Mr. SKRIVAN: Yes, it is.<sup>87</sup>

FairPoint's backpedaling on the application of Verizon's PAP immediately prior to and after the cutover confirms another risk to competition that will occur if the transaction is approved without conditions. Verizon's PAP is designed to prevent backsliding in the preordering, ordering, provisioning, maintenance and repair and billing for wholesale services leased by CLECs. It should make no difference whether the backsliding is that of Verizon or, if the transaction is approved, FairPoint. But for this transaction, CLECs will face no risk that Verizon will cutover all of its wholesale systems on a flash cut basis to a new system and seek to be relieved of the metrics that are contained in the PAP in the event that the cutover does not go well.

**E. FairPoint's Operating Support Systems Should be Subject to the Same Regulatory Scrutiny as Verizon's Systems Prior to the Cutover.**

FairPoint and Verizon have entered into a Transition Services Agreement ("TSA"). Under the TSA, Verizon will perform certain operating support functions, including all of the support and systems that CLECs currently use for the preordering, ordering, provisioning, maintenance and repair and billing for wholesale services, until FairPoint notifies Verizon that it is ready to cutover to its systems.

Under the TSA, FairPoint has sole authority to decide when to cutover from Verizon's systems to its own. Although President Nixon testified that FairPoint's systems will be more efficient than Verizon's,<sup>88</sup> FairPoint has not agreed that FairPoint's systems be subject to third party testing to ensure that they are as good as Verizon's.<sup>89</sup> Nor does Verizon have any contractual duty to insure that FairPoint's systems are at least as good as Verizon's prior to cutover.<sup>90</sup>

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<sup>87</sup> Tr. 9/7/07 at 182, 183.

<sup>88</sup> Prefiled Rebuttal Testimony of Peter Nixon at page 5, lines 18-20, Tr. 9/19/07..

<sup>89</sup> Tr. 9/19/07 at 237.

<sup>90</sup> Tr. 9/7/07 at 41.

As the Board and the FCC have previously found, non-discriminatory access to Verizon's operating support systems is a prerequisite to competition.<sup>91</sup> The FCC has determined that without nondiscriminatory access to the BOC's OSS, a competing carrier "will be severely disadvantaged, if not precluded altogether, from fairly competing" in the local exchange market.<sup>92</sup> NECTA/Comcast witness Pelcovitz described the kinds of harms to CLECs that could arise if FairPoint's wholesale systems are not fully vetted like Verizon's were:

"The perceived harms to the CLEC primarily have to do with what happens when a CLEC acquires a new customer. Market[ing] gets a customer that calls and wants to sign up and get service, there are a number of steps that have to be undertaken in order to bring that customer on board. In particular, those relating to the porting of numbers, to the updating of the directory assistance, and 911 data bases. Those types of orders right now are handled through electronic interfaces with Verizon. If there is a disruption in that process, and for example, Comcast sells service to a new customer, that order could fall out and essentially fall on the floor and not get completed. And Comcast which had told the customer that it's going to provide service on a particular date, will not actually be able to provide service on that date, and that has lots of consequences in terms of the overall reputation and the various customer service departments with the CLEC, the amount of calls they are going to get, the amount of effort they are going to have to go through to straighten out the problems associated with taking orders and not being able to fulfill them."<sup>93</sup>

Today CLECs such as Comcast, Sovernet and segTEL use Verizon's systems to sign up customers, place an order for services with Verizon, track the process of that order to completion, receive billing information, and obtain prompt repair service.<sup>94</sup> The same will be true with respect to FairPoint's untested systems if the transaction is approved.

Before it was permitted to enter the long distance market in Vermont, Verizon was required to demonstrate that its operating support systems were adequate to provide CLECs with access to unbundled network elements and interconnection in commercial volumes and at parity with the

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<sup>91</sup> *Bell Atlantic/NYNEX Merger Order*, at 32,33; *Verizon 271 Order*, Appendix D, para. 25.

<sup>92</sup> *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket 99-295, Memorandum Opinion and Order, para. 83 (1999).

<sup>93</sup> Tr. 9/19/07 at 102, 103.

<sup>94</sup> *Vermont 271 Order*, Appendix D at para. 25.

services that Verizon provides to itself.<sup>95</sup> When analyzing whether a BOC has met the nondiscrimination standard for each OSS function, the FCC first determines whether the BOC has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting carriers to understand how to implement and use all of the OSS functions available to them.<sup>96</sup> The FCC then assesses whether the OSS functions that the BOC has deployed are operationally ready, as a practical matter.<sup>97</sup> There is no reason why FairPoint's new systems should not be subject to the same level of scrutiny as Verizon's. FairPoint's failure to agree to subject its wholesale department and its back office systems to the same rigorous scrutiny as Verizon's systems have been subjected to puts CLECs in a worse position than they are in today with Verizon as its wholesale provider.

In summary, FairPoint has reneged on its commitment to be subject to the same wholesale regulatory obligations as Verizon, to the detriment of competition in Vermont. Instead, FairPoint is attempting to retain its right after closing to seek the suspension or modification of key section 251 obligations that have applied to Verizon for the last 10 years and which the FCC has ruled would result in impairment if they were not provided to CLECs. The Board must not permit this risk of competitive harm.

Second, if FairPoint is not a BOC as it asserts, its voluntary commitment to offer the same checklist items as Verizon is not enforceable by the FCC. FairPoint has not agreed to any meaningful jurisdiction by the Board in this regard. Approving the transaction as proposed by FairPoint would cause competitive harm because CLECs would have no enforcement rights in connection with checklist items.

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<sup>95</sup> *Vermont 271 Order*, paras. 39-44.

<sup>96</sup> *New York 271 Order* at para. 87.

<sup>97</sup> *Id.*

Third, FairPoint seeks the right to discriminate against its competitors by avoiding the same section 272(e) obligations that apply to Verizon and by seeking to be relieved of the metrics contained in the PAP for a 120 day period associated with the cutover—metrics that are designed to ensure parity in the wholesale services that Verizon provides to CLECs. FairPoint must not be given a license to discriminate against competitors that are reliant on it for wholesale services.

Fourth, FairPoint seeks to avoid the same level of scrutiny of its operations support systems that Verizon's systems were subject to. Given that the FCC has determined that without nondiscriminatory access to OSS, a competing carrier "will be severely disadvantaged, if not precluded altogether, from fairly competing" it is critical that FairPoint's personnel, training and systems be subject to the same review as Verizon's systems. If it were not for this transaction, none of the above described harms to competition would exist. The application as proposed should be denied. In the alternative, if the Board decides to approve the merger it should make clear that FairPoint will be subject to the same regulatory obligations as Verizon at close and in the future and that this means that FairPoint will continue to comply with the following regulatory obligations:

1. FairPoint will not seek the exemption, suspension or modification of its section 251 obligations under section 251(f)(1) or (2);
2. FairPoint must submit to the jurisdiction of the Board in connection with the enforcement of its voluntary checklist proposal, including any disputes pertaining to pricing and what elements constitute checklist items;
3. FairPoint must comply with section 272(e);
4. FairPoint must abide by the PAP and will not seek a grace period from application of the PAP in connection with the cutover;



5. FairPoint must subject its operating support systems to the same review that Verizon was subject to in connection with its application for long distance.

**II. FAIRPOINT HAS FAILED TO DEMONSTRATE THAT IT HAS THE FINANCIAL RESOURCES, EXPERTISE AND INCENTIVE TO PROVIDE UNBUNDLED NETWORK ELEMENTS AND INTERCONNECTION TO CLECS IN A MANNER THAT IS EQUAL TO OR BETTER THAN THE PRICES, TERMS, CONDITIONS AND QUALITY PROVIDED BY VERIZON.**

Sovernet and segTEL witness Gary Ball's testimony is that "FairPoint lacks the resources, experience, and incentive to comply with the wholesale obligations it will take on as the predominant ILEC in Vermont" and, that without proper conditions, "the transfer of Verizon's assets to FairPoint will result in increased costs and degraded service quality to CLECs."<sup>98</sup>

Straining the bounds of credibility, Fairpoint witness Lippold actually denies that FairPoint has neither the financial resources nor the experience Verizon has in providing services to CLECs.<sup>99</sup>

FairPoint's own amended S-4 registration statement filed with the Securities and Exchange Commission supports Mr. Ball's assessment as follows:

"All of the risks associated with the integration process could be exacerbated by the fact that FairPoint may not have a sufficient number of employees to integrate FairPoint's and Spinco's businesses or to operate the combined company's business. *Furthermore, Spinco offers services that FairPoint has no experience in providing, the most significant of which are competitive local exchange carrier wholesale services. FairPoint's failure or inability to hire or retain employees with the requisite skills and knowledge to run the combined business, may have a material adverse effect on FairPoint's business.* The inability of FairPoint's management to manage the integration process effectively, or any significant interruption of business activities as a result of the integration process, could have a material adverse effect on the combined company's business, financial condition and results of operations."<sup>100</sup>

FairPoint's corporate disclosure to the SEC reveals what Mr. Lippold denies; FairPoint has "*no experience*" in providing competitive local exchange carrier wholesale services—services that

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<sup>98</sup> Prefiled Direct Testimony of Gary J. Ball at pages 3-6.

<sup>99</sup> Prefiled Rebuttal Testimony of Brian Lippold at page 12.

<sup>100</sup> Amendment 3 to FairPoint Communications, Inc. Registration Statement to the Securities and Exchange Commission, Subject to Completion June 29, 2007, p. 25.

Verizon has reluctantly implemented over the past 10 years.<sup>101</sup> The S-4 also warns that “*FairPoint’s failure or inability to hire or retain employees with the requisite skills and knowledge to run the combined business,*” may have a material adverse effect on FairPoint’s business. The risk is not insignificant. The results of a survey of pension and non-pension eligible workers at Verizon presents a very grave picture for FairPoint, and its ability to retain workers with the requisite skills to run the combined business, if the transaction is approved.<sup>102</sup> Fifty-six Percent of all workers returning surveys stated they would seriously consider leaving the company if the transaction is approved.<sup>103</sup> According to Labor witness Kenneth R. Peres, Phd., “extending these survey results to the rest of the represented workers in the three states indicates that more than 1,200 workers currently employed by Verizon may seriously consider leaving the company if the transaction is approved.”<sup>104</sup> The fact that FairPoint has no wholesale experience and may not have the ability to hire or retain employees with the requisite skills presents a risk to CLECs that would not exist but for the transaction.

Furthermore, like Verizon, FairPoint has no incentive to comply with its wholesale obligations if the transaction is approved.<sup>105</sup> As Mr. Ball explains, “Verizon has been the most aggressive BOC in terms of attempting to shed its regulatory obligations and transition to a purely commercial environment.” Despite promises to provide section 271 checklist items in state section 271 review proceedings, Verizon has resisted any attempts to enforce these obligations.<sup>106</sup>

FairPoint has made no commitments to improve its ability to serve wholesale customers. FairPoint witness Walter Leach discusses FairPoint’s plans for expansion of its retail services, specifically attempting to increase DSL penetration and provide new bundles of services, but

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<sup>101</sup> Prefiled Direct Testimony of Gary J. Ball at page 4, lines 8-10.

<sup>102</sup> Prefiled Surrebuttal Testimony of Kenneth R. Peres, PhD at page 9.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Prefiled Direct Testimony of Gary J. Ball, page 4, lines 7-10.

<sup>106</sup> Prefiled Direct Testimony of Gary Ball at page 17, lines 6-10.

provides no mention of any specific improvements for wholesale service providers.<sup>107</sup> It is clear that FairPoint's focus will be on pursuing retail customers and satisfying investors.<sup>108</sup>

CLECs would like to be able to depend on FairPoint's repeated statements that "FairPoint values its wholesale customers,"<sup>109</sup> that it wishes to "grow the wholesale business,"<sup>110</sup> that the wholesale business is a valuable revenue stream,<sup>111</sup> and that FairPoint intends to treat "competitors as valued customers,"<sup>112</sup> but at this time, given the circumstances, such statements must be taken at face value. Although Mr. Lippold asserts "I believe CLECs will fare even better under FairPoint, the early returns suggest otherwise. For example, when put to the test, FairPoint: rejected CLEC requests that it adopt competitive best practices for offering unbundled dark fiber interoffice transport under section 251<sup>113</sup>; initially supported then backtracked on support for a rapid response team to promptly address wholesale disputes following the cutover<sup>114</sup>; and flatly rejected CLEC requests that FairPoint voluntarily offer dark fiber loops, dark fiber entrance facilities and line sharing as checklist items in a wholesale tariff.<sup>115</sup> When asked in a data request what the rates, terms and conditions would be for dark fiber loops under any commercial agreement offered by FairPoint, the company would not provide such rates, terms and conditions and asserted that "[a]greements with CLECs will be reasonable, or the CLECs will not enter into them...CLECs will

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<sup>107</sup> Prefiled Direct Testimony of Walter Leach at pages 6,7.

<sup>108</sup> Prefiled Direct Testimony of Gary J. Ball at page 23, lines 3,4.

<sup>109</sup> Prefiled Rebuttal Testimony of Brian Lippold at page 32, line 19.

<sup>110</sup> Tr. 9/17/07 at 74.

<sup>111</sup> *Id.*

<sup>112</sup> Prefiled Rebuttal of Brian Lippold at page 13, line 11.

<sup>113</sup> Such best practices would include reducing the fibers that Verizon reserves for itself in Vermont to the same number of fibers it reserves to itself in Maine; permitting carriers to order only 1 fiber if 2 fibers are not available as in Maine; and providing dark fiber separation services in Vermont as in Maine.

<sup>114</sup> Compare Mr. Lippold's prefiled testimony at pages 27-28, where he states "If the creation of a rapid response team would facilitate rapid resolution of disputes that might arise after the cutover, we would consider it. FairPoint wants to have the best possible relationships with its wholesale customers and will be working hard to create a customer/vendor relationship where issues can be dealt with in a professional and expeditious manner" with his statement at the hearing: "the more I've learned about the rapid response process that was implemented in Maine, the more I feel it's not necessary ... I just don't feel like it's necessary for the regulators to become involved in the running of the business, if you will." Tr. 9/17/07 at 79,80.

<sup>115</sup> SOV/SEG Exh. 9.

either choose to enter into agreements with FairPoint on commercially negotiated terms, or CLECs will chose to build their own facilities or purchase them from a third party.”<sup>116</sup> Unfortunately, FairPoint is assuming the same hostile regulatory positions that Verizon has taken. If FairPoint really meant statements such as “[t]his is a great opportunity for FairPoint to change the wholesale relationship between the ILEC supplier and its CLEC and other customers,”<sup>117</sup> perhaps it could treat Sovernet as a customer and agree to provide it with a single fiber if there are not two available in a given location. Unfortunately, it seems, as pointed out by Mr. Ball, “[c]ompetitors could very well end up with the worst of both worlds, inheriting Verizon’s hostile regulatory stance combined with FairPoint’s inexperience and limitations as a wholesale provider.”<sup>118</sup>

Financial pressure is also likely to exacerbate FairPoint’s incentives to avoid its wholesale regulatory obligations.<sup>119</sup> Contributing to the risk are a number of factors including FairPoint’s high its high level of debt<sup>120</sup> and its high dividend policy.<sup>121</sup> This point is underscored by a June 5, 2007, Analyst Report. In the report, Morgan Stanley states that FairPoint’s own amended S-4 filing contains forecasts suggesting the company will not generate enough cash flow to cover its current dividend in 2008, with an increasing deficit.<sup>122</sup>

These factors tend to heighten the risk that CLECs will face increased costs or degraded service quality if the transaction is approved as proposed. Such an increase in cost and/or degradation in service quality would tend to obstruct or prevent competition and would not exist but for the proposed transaction. CLECs today do not need to worry whether their supplier of unbundled network elements and interconnection services has the financial resources and the

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<sup>116</sup> SOV/SEG Exh. 9.

<sup>117</sup> Prefiled Rebuttal Testimony of Brian Lippold at page 32, line 19.

<sup>118</sup> Prefiled Direct Testimony of Gary J. Ball, page 17, lines 21-23.

<sup>119</sup> *Id.* at page 3, lines 18-21.

<sup>120</sup> Prefiled Direct Testimony of Randy Barber at page 12, lines 18-20.

<sup>121</sup> *Id.* at 26 (“[I]t is clear that FairPoint management will consider almost any alternative to reduce costs before turning to its high dividend policy.”)

<sup>122</sup> DPS Exh. Cross 15.

experience to provide wholesale services. Sovernet and segTEL witness Ball has proposed some key safeguards to mitigate the risks to competition that were voluntarily agreed to by SBC and Verizon in connection with recent merger proceedings, including:

- 1) a cap on the rates for unbundled network elements, tandem transit and special access services for 42 months;
- 2) a three-year extension of interconnection agreements; and
- 3) an agreement not to seek forbearance under section 10 of the Communications Act for at least 42 months. Unfortunately, FairPoint has not voluntarily agreed to these safeguards, which exposes CLECs to the heightened risk that they will face an increase in costs and a decrease in service quality if the transaction is approved as proposed.

The Board should not approve the transaction as proposed because it will obstruct or prevent competition in the market for wireline telecommunications services. In the alternative, the Board should impose the conditions above in addition to the requirement in Section I of this brief that FairPoint remain subject to the same regulatory obligations as Verizon.

### **III. FAIRPOINT HAS FAILED TO ADEQUATELY DESCRIBE ITS PLANS FOR ITS WHOLESALE ORGANIZATION AND OPERATION SUPPORT SYSTEMS.**

A key aspect of the transaction is that it does not include Verizon's wholesale organization. This will require FairPoint, a carrier with no wholesale experience, to create its own wholesale department to provide the services to CLECs that Verizon currently provides.<sup>123</sup>

Today, when a CLEC orders interconnection from Verizon under section 251, the request is handled by the Interconnection Services Team.<sup>124</sup> The Interconnection Services Team is staying with Verizon.<sup>125</sup> When a CLEC requests access to poles and conduit, that request goes to Verizon's

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<sup>123</sup> Prefiled Direct Testimony of Gary J. Ball at page 8, lines 8-11.

<sup>124</sup> Tr. 9/7/07 at 39.

<sup>125</sup> *Id.*

License Administration Group.<sup>126</sup> The License Administration Group is staying with Verizon.<sup>127</sup> Today, when a CLEC requests collocation from Verizon, it is handled by Verizon's Collocation Care Center.<sup>128</sup> The Collocation Care Center is not being transferred to FairPoint.<sup>129</sup> When a CLEC preorders and orders unbundled network elements and interconnection from Verizon, those orders go through the National Market Center and the Access Service Operations Center.<sup>130</sup> Those departments are not being transferred to FairPoint.<sup>131</sup> Similarly, the provisioning of local services on behalf of CLECs is being performed by Verizon's Regional CLEC Coordination Center, which is not being transferred to FairPoint.<sup>132</sup> When a CLEC seeks the repair of an unbundled network element or wholesale service it is handled by Verizon's Regional CLEC Maintenance Center, which is not being transferred to FairPoint.<sup>133</sup> Finally, today, CLEC bills are handled by Verizon Service Operations, Wholesale Claims and Collections, which is not being transferred to FairPoint.<sup>134</sup>

In addition to keeping its wholesale department, Verizon will retain all of the back office systems that CLECs use today in connection with preordering, ordering, provisioning, maintenance and repair, and billing for unbundled network elements and interconnection services.<sup>135</sup>

Accordingly, FairPoint will have to create, staff and train its own wholesale department and build its own operations support systems to serve wholesale customers to handle all of the functions described above. Because this has not been completed, the Board is essentially being asked to make a predictive judgment about whether FairPoint's wholesale organization and systems will be as good as or better than Verizon's.

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<sup>126</sup> Tr. 9/7/07 at 36.

<sup>127</sup> *Id.*

<sup>128</sup> Tr. 9/7/07 at 37.

<sup>129</sup> *Id.*

<sup>130</sup> SOV/SEG Exh. 1

<sup>131</sup> Tr. 9/7/07 at 37.

<sup>132</sup> Tr. 9/7/07 at 37.

<sup>133</sup> Tr. 9/7/07 at 39.

<sup>134</sup> Tr. 9/7/07 at 40

<sup>135</sup> Tr. 9/7/07 at 40.

FairPoint has not provided sufficient information about its proposed wholesale organization or its operational support systems, nor has it committed to any meaningful process to ensure that systems get implemented and tested with the involvement of other parties, including competitors.<sup>136</sup>

Mr. Lippold's testimony describes a company that is still in the early stages of building a wholesale organization. He acknowledges that FairPoint has not yet hired or trained all of the personnel that will be necessary to provide the same level of service as Verizon. Nor have the training materials for wholesale personnel been completed. FairPoint has not yet implemented all of the necessary systems.<sup>137</sup> A certification process for CLECs is planned to insure that they are properly trained, but those training materials have not been completed.

Mr. Lippold anticipates that existing Verizon employees will migrate to FairPoint but the results of Labor witness Peres's survey of current pension and non-pension eligible Verizon workers suggests that many of these workers will leave if the transaction is approved.<sup>138</sup> President Nixon asserts that FairPoint's systems will be more efficient than Verizon's, but FairPoint is unwilling to agree to the testing of its OSS by a third-party auditor.<sup>139</sup> Further, FairPoint actually intends to combine its wholesale department with its retail business department, and has not yet developed a policy or code of conduct to insure that carrier change information obtained in the wholesale context is not shared with its retail operations in the very same department.<sup>140</sup>

**A. The Financial Arrangements in the TSA Give FairPoint an Incentive to Prematurely Cutover to FairPoint's own Organization and Systems.**

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<sup>136</sup> Prefiled Direct Testimony of Gary Ball, page 8.

<sup>137</sup> Prefiled Surrebuttal of Gary Ball, page 1.

<sup>138</sup> Direct Prefiled Surrebuttal Testimony of Kenneth Peres, PhD, at

<sup>139</sup> Tr. 9/19/07 at 237.

<sup>140</sup> Tr. 9/7/07 at 273; TR. 9/17/07 at 67-70; SOV/SEG Exh. 30.

It is anticipated that FairPoint's systems will not be completed prior to closing.<sup>141</sup> As a result, FairPoint will rely on Verizon's support services for a time in accordance with a Transition Services Agreement (TSA).<sup>142</sup>

The TSA includes extremely high fees for use of its support systems, including significant financial penalties to FairPoint for failing to cutover to its systems by the end of the first year after the closing.<sup>143</sup> FairPoint must pay Verizon \$14.2 million per month for the first eight months of the TSA. The rates then decrease by \$500,000 per month for the next 4 months, but on the 13<sup>th</sup> month, the rates go back up to \$14.2 million per month, and increase by \$500,000 per month each month after. According to Sovernet and segTEL witness Gary Ball, "if FairPoint's systems aren't ready by the first year, they will be under great financial pressure to cutover to their own systems to avoid the mounting payments to Verizon."<sup>144</sup>

FairPoint witness Lippold disputes Mr. Ball's assertion that the TSA will put pressure on FairPoint due to the increasing financial penalties that accrue after the first 12 months, asserting that the cutover will have already been completed.<sup>145</sup> However, FairPoint's own amended S-4 filing with the SEC corroborates Mr. Ball's testimony by acknowledging the financial pressure and risk of having to rely on the TSA after the first 12 months as follows:

*"In addition, if the combined company continues to require services from Verizon under the transition services agreement after the one-year anniversary of the closing of the merger, the fees payable by the combined company to Verizon pursuant to the transition services agreement will increase significantly, which could have a material adverse effect on the combined company's business, financial condition and results of operations. The aggregate fees expected to be payable by the combined company under the transition services agreement for the six-month period following the merger will be approximately \$132 million. However, if the combined company requires twelve months of transition services*

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<sup>141</sup> Tr. 9/7/07 at 40, 41.

<sup>142</sup> Prefiled Direct Testimony of Gary J. Ball, page 8.

<sup>143</sup> Prefiled Direct of Gary J. Ball, at page 9.

<sup>144</sup> *Id.* at 9, lines 20-22.

<sup>145</sup> Lippold Rebuttal Testimony at 27, lines 1-3.



following the merger, the aggregate fees expected to be payable will be approximately \$226.9 million.”<sup>146</sup>

Notwithstanding Mr. Lippold’s assertion that the cutover will take place within 12 months, there is evidence that the cutover may take more than a year. The cutover from Verizon’s systems to Hawaiian Telcom’s systems demonstrates how a cutover can be delayed due to unforeseen issues. The parties to the Hawaii transaction were equally confident in their ability to quickly manage a cutover and they are still dealing with their implementation well over 15 months after cutting over from their TSA to their own systems.<sup>147</sup> If the Board is to approve the instant transaction it must have a high degree of confidence that FairPoint has voluntarily put in place safeguards that ensure the situation in Hawaii will not happen in Vermont or it must impose such safeguards.

#### **B. The Closest Analogy to the Instant Transaction is Verizon’s Sale of its Hawaii Assets to the Carlyle Group**

In March of 2004, Verizon and the Carlyle Group requested permission from the Hawaii PUC to transfer ownership of Verizon Hawaii to the Carlyle Group.<sup>148</sup> A TSA was implemented to transition the back office organizations and operational support systems from Verizon to Carlyle. In April of 2006, Hawaiian Telcom, which is the name of the new entity, prematurely cutover to its own systems designed by BearingPoint, a third-party vendor, leading to numerous problems for both retail and wholesale customers.<sup>149</sup>

The scope of these problems was detailed in Hawaiian Telcom’s own 10-K filing with the SEC in which it states:

“On the April 1, 2006, cutover date, while the major network operational systems were built and functioned without significant problems, critical systems related to back office functions, such as customer care, order management, billing, supply chain, and other

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<sup>146</sup> SOV/SEG Exh. 12, page 26 (emphasis added).

<sup>147</sup> Prefiled Surrebuttal of Gary J. Ball at page .

<sup>148</sup> Prefiled Direct of Gary J. Ball at page 10.

<sup>149</sup> *Id.*

systems interfacing with our financial systems, lacked significant functionality. This led to deficiencies in billings and collections, revenue assurance, and order entry flow-through. Despite BearingPoint's efforts to improve the functionality of the related systems, we continued to experience many of these same issues, requiring us to incur significant incremental expenses in 2006 to retain third-party service providers to provide call center and manual processing services in order to operate our business."

The 10-K proceeds to discuss a \$52 million settlement reached with BearingPoint for failure to provide the services it had committed to, as well as a subsequent agreement with another third party vendor, Accenture, to fix BearingPoint's systems. This restorative effort is expected to continue into 2008. Hawaiian Telcom's 10-K describes the current problems and efforts they are being forced to undertake to correct these problems:

The lack of full system functionality following the Transition Period substantially impacted both customer satisfaction (as evidenced by large increases in the customer call volumes at our work centers) and collection efforts in 2006. However, our remediation and systems recovery efforts begun in 2006 are beginning to show some improvements. Functionality is improving for our critical systems related to back office functions such as customer care, order management, and billing systems. As a result, while systems issues still exist, we are experiencing fewer collection treatment delays, physical bill delivery problems and order flow-through issues, and customer call volumes at our work centers have decreased. We continue to work to improve our system functionality.

It is telling that Verizon witness Smith revealed that he had concerns about Hawaiian Telcom's readiness prior to the cutover, and actually met with representatives of Hawaiian Telcom prior to the cutover to express his concerns. There is no testimony about whether Mr. Smith relayed these concerns to the Hawaii PUC. But he did testify that if he had those same concerns here, he would contact Mr. Nixon. And if he still had concerns, he had "no obligation to let the three northern states know."

Although Verizon witness Smith freely acknowledges the problems in Hawaii, FairPoint OSS witness Arthur Kurtze admits that he never contacted BearingPoint or the Hawaii PUC concerning the cutover problems encountered in Hawaii and what could be done to mitigate the

risk of a poor cutover in Vermont, Maine and New Hampshire.<sup>150</sup> Further, at the hearing, Mr. Kurtze admitted that FairPoint had not completed any mitigation plan, stating that testing was the best way to mitigate the risk of a poor cutover.<sup>151</sup> Even in this regard, Mr. Kurtze admitted that FairPoint's test strategy document had not yet been completed and that it would not be finished for another 30 days.<sup>152</sup> As is the case with FairPoint's wholesale department and wholesale support systems, FairPoint is essentially asking the Board to make a predictive judgment about whether its cutover testing is adequate to mitigate the risks of a poor cutover. Given the experience in Hawaii, the Board should err on the side of caution.

Although FairPoint and Verizon attempt to explain why the instant transaction is different from in Hawaii, the parallels are obvious. Both transactions involve i) the same seller, ii) a sale to a smaller, less experienced provider, iii) the requirement that the buyer create, train and staff its own wholesale department and back office systems; iv) the retention of a consultant to design new systems; v) the provision of operating support systems under a TSA until new systems are developed, vi) notice of readiness provided by the smaller carrier, and vii) no requirement of a third party auditor to ensure that the new systems were as good as or better than the existing systems.<sup>153</sup>

**C. FairPoint has failed to Agree to Conditions that are Sufficient to Mitigate the Risk of a Poor Cutover.**

Under the TSA, FairPoint has sole authority to determine when it will cutover from Verizon's systems to its own. Verizon has no contractual responsibility to insure that FairPoint's systems are at least as good as Verizon's prior to cutover. Nor does FairPoint or Verizon have any

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<sup>150</sup> Tr. 9/19/07 at 18.

<sup>151</sup> Tr. 9/18/07 at 162.

<sup>152</sup> Tr. 9/19/07 at 174.

<sup>153</sup> See, Prefiled Direct Testimony of Michael Pelcovits at pages 19-23; *In the Matter of the Application of Paradise Mergersub, Inc., GTE Corporation, Verizon Hawaii Inc, Bell Atlantic Communications, Inc and Verizon Select Services Inc.*, Docket 04-0140, Decision and Order (March 16, 2005).

responsibility to certify to the Vermont Board prior to cutover that FairPoint's systems are at least as good as Verizon's.

Sovernet and segTEL witness Ball recommended conditions to ensure that the Hawaii situation is not repeated in Vermont. According to Mr. Ball, it is essential that whatever new systems FairPoint wishes to implement be fully tested by an independent auditor before being cutover for live usage.<sup>154</sup> The Board should retain ongoing jurisdiction over FairPoint and Verizon while the TSA is in effect and during the cutover, and must retain jurisdiction over FairPoint's systems after the cutover to ensure that FairPoint wholesale services, systems, processes and procedures are at least as good as Verizon's. The conversion from the TSA should only be allowed after Board review and approval, which should be conditioned on third-party audits of any new proposed system as well as the consideration of CLEC input.<sup>155</sup> Mr. Ball also recommends that the Board require a rapid response team similar to the one created in Maine as part of the Maine PUC's review of Verizon's application to enter the long distance market to immediately deal with any intercarrier problems that might arise post cutover.<sup>156</sup> Finally, Mr. Ball suggested that the Board order the establishment of a fund to compensate CLECs for any costs they incur to conform their systems and processes to FairPoint's new systems and for any competitive harms due to systems not being properly implemented.<sup>157</sup> This could be accomplished by placing 10 percent of the amounts billed by Verizon to FairPoint under the TSA into a fund to be administered by an independent third party.<sup>158</sup>

FairPoint opposes Mr. Ball's recommendation that the Board retain jurisdiction over FairPoint and Verizon while the TSA is in effect and that the conversion to FairPoint systems only

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<sup>154</sup> Prefiled direct testimony of Gary J. Ball at page 12, lines 13-14.

<sup>155</sup> *Id.* at page 6, lines 9-15.

<sup>156</sup> *Id.* at page 12, lines 17-19.

<sup>157</sup> *Id.* at page 12, lines 19-23.

<sup>158</sup> *Id.*

be permitted after a third party audit shows that FairPoint's systems are at least as good as Verizon's. According to Mr. Lippold, "the Board will be able to review FairPoint's activities following the transaction so there is no need for such a condition."<sup>159</sup> However, when confronted with the language in Verizon's cutover plan that states "once final data is extracted and purged from Verizon's systems there is no fall back and no reversal [and that] Verizon will not have the ability to restore and reactivate purged data," Mr. Lippold conceded that if there are widespread problems with FairPoint's systems post cutover there is no going back to Verizon to fix it.<sup>160</sup> He also agreed that the fact that the Board can review FairPoint's activities after the cutover is not going to change that.<sup>161</sup>

FairPoint appears to agree with Mr. Ball's recommendation regarding the creation of a rapid response team as follows:

"If the creation of a rapid response team would facilitate rapid resolution of disputes that might arise after the cutover, we would consider it. FairPoint wants to have the best possible relationships with its wholesale customers and will be working hard to create a customer/vendor relationship where issues can be dealt with in a professional and expeditious manner."<sup>162</sup>

However, he disagrees with the creation of a fund to compensate CLECs in the event of a poor cutover on the grounds that CLECs have adequate remedies.<sup>163</sup> On cross examination, however, Mr. Lippold admitted that he was not aware of whether the Board could award damages, was not aware of the the limitation of liability provisions in CLEC interconnection agreements and couldn't remember whether payments under the PAP in Vermont go to CLECs.<sup>164</sup>

FairPoint's failure to voluntarily agree to cutover safeguards, including that the cutover only take place after a third-party audit reveals that its systems are at least as good as Verizon's, and that

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<sup>159</sup> Prefiled Rebuttal Testimony of Brian Lippold at page 27, lines 10-11; Tr. 9/7/07 at page 254.

<sup>160</sup> Tr. 9/7/07 at 256.

<sup>161</sup> *Id.*

<sup>162</sup> Lippold Rebuttal at page 27, lines 20-22, page 28, lines 1-2.

<sup>163</sup> Prefiled rebuttal of Brian Lippold at page

<sup>164</sup> Tr.0/17/07 at 33, 34.

it will not agree to a fund to compensate CLECs for harms resulting from a poor cutover, creates the risk of competitive harms that would not exist but for the proposed transaction. Given that it will not voluntarily agree to such a condition as a binding commitment of the merger, the Board should either deny the application as filed, or impose the requirement of a third party audit and CLEC fund as proposed by Mr. Ball. The Board should also approve the creation of a rapid response team to resolve intercarrier disputes as in Maine.

**D. FairPoint Should Not Be Permitted To Rush the Cutover Timeline Or Rush Any Third Party Consultant Review Of Its Systems**

FairPoint witness Michael Haga insisted that accuracy is more important than speed. However, FairPoint's proposed timetable suggests the opposite. First, FairPoint currently intends to cutover to Verizon's systems in May of 2008, just four months after the anticipated closing date. In order to do this it intends to give CLECs notice in November of 2007, before state regulatory commissions are scheduled to act on the application, well before closing and well before FairPoint is scheduled to become the ILEC in Vermont if its transaction is approved.

FairPoint's timeline for the cutover foresees a rapid progression of events, within a very short window of time, during which several important events will occur.<sup>165</sup> NECTA/Comcast witness Pelcovitz suggests a 12-month notice to CLECs instead of the 6 months proposed by FairPoint. DPS witness Mills also concludes that FairPoint's timeline is aggressive and does not know if it is achievable, but does not offer a specific time frame he thinks would be reasonable.<sup>166</sup>

Time appears to be the reason that FairPoint has opposed a third party auditor or monitor. According to Michael Haga's and Arthur Kurtze's rebuttal testimony, "reporting to an independent monitor would inhibit the process, delay progress, and delay the transaction. On the contrary,

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<sup>165</sup> Tr. 9/19/07 at 111.

<sup>166</sup> Tr. 9/19/07 at 166.

allowing the Department to review information necessary to assess the various plans and processes would permit the process to continue and allow the Department to make informed decisions.”<sup>167</sup> Under cross examination by the DPS, Mr. Kurtze conceded that time spent reporting to such a monitor/third party consultant could prove beneficial if the third party monitor adds value.<sup>168</sup>

At the hearing, it was revealed that Mr. Haga and Mr. Kurtz had filed rebuttal testimony in New Hampshire in which FairPoint has agreed to retain, at its expense, one of the consulting firms retained by the Maine or New Hampshire commissions as a single expert to review the FairPoint Test Strategy document, which includes: test strategy definitions and objectives; test defect classifications and guidelines; system test entry and exit criteria; testing metrics; and notice of readiness (cutover) criteria.<sup>169</sup> The test review process would have two phases. The first phase would involve the consultant’s review of the Test Strategy. The second phase would involve test execution and results reviews.<sup>170</sup>

On cross examination, Mr. Haga described the first phase of activity involving the development of testing plans and strategy, and indicated that he wanted a third party consultant as soon as possible. The third party consultant would have the ability to evaluate the test plans and testing strategy and suggest modifications those test plans and strategy.<sup>171</sup>

No party other than FairPoint testified that the New Hampshire proposal was sufficient. Noting that FairPoint’s proposal started with no independent third party involvement, NECTA witness Pelcovitz testified that the New Hampshire proposal was a step in the right direction but

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<sup>167</sup> Prefiled Joint Rebuttal Testimony of Michael Haga and Arthur Kurtze at page 36, lines 17-18.

<sup>168</sup> Tr. 9/19/07 at 28.

<sup>169</sup> NECTA Exh. Cross 53 at page 38.

<sup>170</sup> *Id.* at 41, 42.

<sup>171</sup> Tr. 9/19/07 at 76.

that it was “deficient.”<sup>172</sup> Asked what would address his concerns over the cutover issues and testing, Mr. Pelcovitz stated:

“Ultimately I think it’s critical that the third party tester know that it’s on the line to make the right decision. In other words, it’s just not there in a general advisory role. But its got to make a determination at some point whether or not things are ready to go. And then what I think follows from that is the third party tester will then have the appropriate role in designing the test.”<sup>173</sup>

Sovernet and segTEL witness Ball agree that the New Hampshire proposal is deficient and emphasised the importance of following the 271 model:

“I feel very strongly that you really want to be very close to the 271 model. Even if it means having to push off the cutover date. ... FairPoint ...does not have experience providing these types of services in their other markets. My concern is they are going to be very focused on their retail customers but not as focused on making sure the systems for CLECs are fully operational and tested ... so I think a lot more needs to be done to get a strong third party who will design the test, who will essentially oversee the test, and insure that if there are flaws noted, that the flaws get fixed before the cutover.”<sup>174</sup>

DPS witness Mills testified that the third party monitor must have the ability to review the testing strategy document to see if it is sufficient in scope and concluded that based on his review of such document at least two more tests should be added, conversion testing and business simulation.<sup>175</sup> He also indicated that the third party auditor should have the authority to report to the Board if there were problems or disagreements and to seek Board action if there was a need to delay the cutover.<sup>176</sup> Finally, Mr. Mills testified that the third party auditor should have “sign off.”<sup>177</sup>

Sovernet and segTEL understand and appreciate that FairPoint does not want to stay on the TSA any longer than necessary. But FairPoint should not be permitted to cutover from Verizon’s

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<sup>172</sup> Tr. 9/19/07 at 121.

<sup>173</sup> Tr. 9/19/2007 at 155.

<sup>174</sup> Tr. 9/19/07 at 154-155.

<sup>175</sup> Tr. 9/19/07 at 183.

<sup>176</sup> *Id.* at 190, 191.

<sup>177</sup> *Id.* at



independently tested systems to its new systems without a meaningful, independent third party audit that permits the auditor, in conjunction with the Board, to delay any plans to cutover if it finds that FairPoint's systems are not as good as Verizon's.

**V. FairPoint Has Failed to Agree to Conditions to Safeguard Against Harms to Competition. The Board Should Either Deny the Application or Impose Conditions to Protect Competition.**

As demonstrated in Part I of this brief, FairPoint has reneged on its commitment to be subject to the same regulatory obligations as Verizon, to the detriment of competition. Instead, FairPoint seeks to retain the right after closing to seek the suspension or modification of key unbundling and interconnection obligations that have applied to Verizon for the last 10 years. The FCC has found that CLEC business plans would be impaired in the event that these network elements were not available. Second, while asserting that it is not a BOC, FairPoint has made a voluntary checklist item proposal that is illusory because the FCC would not have enforcement authority over it and FairPoint will not agree to submit to the Board's jurisdiction. This proposal would put CLECs in a worse position than they are in today because they would have no enforcement rights. Third, FairPoint seeks the right to discriminate against competitors by avoiding the same section 272(e) requirements that apply to Verizon and avoiding the PAP for a key period associated with the cutover—the period when it matters most to CLECs. FairPoint must not be given permission to discriminate against competitors who are relying on it for access to unbundled elements and interconnection. It is important to understand that the PAP will not compensate CLECs if there are widespread system failures after the cutover.<sup>178</sup> This highlights the importance of getting it right prior to cutover, the need for a rapid response team to resolve intercarrier disputes following the cutover, and the need for a fund to compensate CLECs if there are problems with the

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<sup>178</sup> *Vermont 271 Order*, para.78.

cutover.<sup>179</sup> Fourth, FairPoint seeks to avoid the same level of scrutiny that Verizon's systems were subject to. Given that the FCC has determined that without nondiscriminatory access to OSS, a competing carrier "will be severely disadvantaged, if not precluded altogether, from fairly competing," there can be little doubt that the failure to submit FairPoint's systems to the same scrutiny as Verizon's systems will tend to obstruct or prevent competition. But for the proposed transaction none of the above described harms would exist.

As demonstrated in Part II of this brief, FairPoint lacks the resources, experience and incentive to comply with the wholesale obligations it will take on as the predominant ILEC in Vermont. Without proper conditions, the transfer of Verizon's assets to FairPoint will result in increased costs and or a decrease in service quality for CLECs. Such an increase in cost and/or decrease in service quality would serve to obstruct or prevent competition and would not exist but for the proposed transaction.

Mr. Skrivan states that FairPoint will agree to extend all intercarrier agreements (including interconnection agreements) for one year following the expiration date and will extend month-to-month agreements for one year and refuses to agree to freeze the rates for unbundled network elements and interconnection services in the SGAT for any period at all.<sup>180</sup> This offer is inadequate in comparison to the voluntary agreements that Verizon agreed to in connection with its merger with MCI, and the more recent voluntary conditions that SBC agreed to in connection with its merger with Bell South.<sup>181</sup> With respect to the latter, SBC agreed to extend interconnection agreements for three years; agreed to a freeze on unbundled network elements, tandem transit, and special access for 42 months; agreed not to seek forbearance under section 10 of the Act for 42

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<sup>179</sup> Prefiled Direct Testimony of Gary J. Ball at pages 12-13.

<sup>180</sup> Tr. 9/07/07 at 171.

<sup>181</sup> Prefiled Surrebuttal Testimony of Gary J. Ball at 10, lines 1-7.

months; and agreed to a host of other conditions to ensure the continued availability, cost and quality of wholesale services.<sup>182</sup>

As demonstrated in Part III of this Brief, FairPoint generally has failed to adequately describe its plans for its wholesale organization and operating support systems. Most importantly, FairPoint has failed to voluntarily agree to cutover safeguards, including that such cutover only take place after a third party audit reveals that its systems are at least as good as Verizon's systems, and that it will create a CLEC fund to compensate CLECs for harms resulting from a poor cutover. This failure creates the risk of competitive harms that would not exist but for the proposed transaction.

For the reasons described in this brief, the application as proposed should be denied. In the alternative, if the Board decides to approve the merger, it should make clear that FairPoint will be subject to the following conditions to guard against competitive harms:

1. FairPoint will not seek the exemption, suspension, or modification of its section 251 obligations under section 251(f)(1) or (2);
2. FairPoint must submit to the jurisdiction of the Board in connection with the enforcement of its voluntary checklist proposal, including any disputes pertaining to pricing and what elements constitute checklist items;
3. FairPoint must comply with section 272(e);
4. FairPoint must abide by the PAP and will not seek a grace period from the application of the PAP in connection with the cutover;
5. FairPoint must subject its operating support systems to the same review that Verizon was subject to in connection with its application to enter the long distance market;

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6. FairPoint must cap the rates for unbundled network elements, tandem transit and interconnection services in Verizon's SGAT for at least 42 months and will convert the SGAT into a wholesale tariff.
7. FairPoint must extend existing interconnection agreements for a three year period;
8. FairPoint will not seek forbearance under section 10 of the Communications Act for at least 42 months.
9. FairPoint will fund an independent third party auditor to be selected by the Department to review, test and evaluate FairPoint's operating support systems prior to cutover to ensure that FairPoint's systems, including its wholesale systems, are at least as good as Verizon's systems.
10. FairPoint will establish a CLEC fund to compensate CLECs for costs incurred in connection with FairPoints new systems and for damages that are incurred in the event of cutover problems.

Respectfully Submitted,

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